IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 58 OF 2003.

Mr. Kamal Lama, alias,
Akal Man Taman,
of full age,
Nepalese National,
Resident of Village Kharai,
Nepal,
presently in the Central Jail,
at Aguada, Goa. .... Appellant.

Versus

Union of India,
Through Shri M.P. Vaz,
Superintendent of Central Excise,
Anti-Smuggling Unit, Margao,
Goa. .... Respondent.

Shri Gopal Kanekar, Advocate for the Appellant.

Shri J. Vaz, Special Public Prosecutor for the Respondent.

CORAM: N. A. BRITTO, J.

DATE OF RESERVING THE JUDGMENT: 24.09.2004.
DATE OF PRONOUNCING THE JUDGMENT: 1.10.2004.

J U D G M E N T:

The appellant herein, who is an accused (No.1) in Special Criminal Case No.4/2001 has filed the present appeal against the Judgment/Order of the learned Special Judge, N.D.P.S. Court, Mapusa, convicting and sentencing him under Section 20(b)(ii) of N.D.P.S. Act 1985 (Act, for short) to undergo R.I. for a term of ten

years and fine of Rs. 1 lakh in default to undergo S.I. for one year.

2. The accused was prosecuted in the said case upon a complaint filed by Shri M.P. Vaz, Superintendent of Central Excise, Anti-Smuggling Unit, Margao, Goa.

3. The case of the complainant, briefly stated, was that on 14.11.2000 at about 15.00 hrs. Shri J.T. Cruz , Inspector of Customs and Central Excise, Margao received information that one person by name Shri Kamal Lama (A.1), aged about 25 years, fair complexion, short in stature and having oriental looks would be in possession of sizable quantity of hashish which was meant to be supplied to a prospective customer near about Starco restaurant at Anjuna at about 17.00 hrs. and that the said information which was received at Chapora by the said J.T. Cruz was submitted to the complainant immediately who was camping at Chapora along with other officers and the details of the said information were handed over to the complainant under a sealed cover and the said Shri Cruz submitted a report in form DRI-1 to the Deputy Director, Directorate of Revenue Intelligence, Mumbai and the Commissioner of Customs and Central Excise, Panaji, and also to Shri A.F. Monteiro, Asst. Commissioner, Central Excise, Panaji, and thereafter a team of officials headed by the complainant and others proceeded to Anjuna along with two independent panchas by departmental vehicle and positioned themselves near the Starco restaurant at about 17.00 hrs. and, at

about 17.30 hrs they saw a person matching the given description who identified himself as Kamal Lama (A.1) and he was told that he had a right to search the officials as well as the panch witnesses, but he declined to do so and then the complainant inquired of the said Kamal Lama about the contents of the green colour haversack and he admitted that it contained hashish and thereafter the said Kamal Lama was made to sit in the Departmental jeep and they proceeded to Chapora Customs House where the accused was informed that his person was to be searched under the provisions of the Act and was further informed that the accused had an option to be physically searched before a Magistrate or an independent Gazetted Officer, which option the accused declined and was accordingly searched by Shri J.T. Cruz and in the course of the search, two identity cards amongst other articles were found and in the said haversack darkish black colour substance in the shape of cigars of various sizes and flat disc shape objects were found and which was found to be weighing 8 kgs. and from which the said Shri Cruz drew two representative samples of 50 gms. each of which were separately packed and sealed with the seal of South Goa Anti Smuggling Unit, Margao and the said remaining quantity of 7.900 kgs. were separately sealed and put in a corrugated carton and thereafter the statement of the accused (A.1) was recorded under Section 67 of the Act and in his statement the accused Kamal Lama admitted that the said 8 kgs, of hashish were given to him by one Dinesh Arolkar (A.2) to be delivered to one German National who was introduced to him on the same day in the

morning. The case of the complainant was also that the accused Kamal Lama was arrested at about 1.30 hrs. on 15.11.2000 and was later produced before the J.M.F.C. and was remanded till 17.11.2000 and a report under Section 67 of the Act was sent to the Commissioner, Central Excise, Panaji on 15.11.2000 and out of the two samples of 50 gms. each, one sample namely S-1 was sent to the Director of Food and Drugs Administration, Panaji and the other sample (S-2) along with the remaining quantity was deposited in the warehouse on 15.11.2000.

4. The case of the complainant, as regards the seizure was supported by the complainant himself and P.W.4 Francisco Rebello, who was a panch witness, and the latter claiming to be a friend of the former. The complainant for reasons best known to himself, chose not to examine the said Inspector Shri J.T. Cruz who, according to the case of the complainant, was not only an officer who had received the said information but who had also recorded the same in writing and not only that had actively participated in the seizure including the weighing of the seized quantity, drawing the samples therefrom, etc.

5. The prosecution also examined P.W.1 Shri Kaissare who tested the sample (S-1) and also the other sample and the remaining substance and found that the same was hashish. P.W.2 Ms. Gonsalves was the substitute Warehouse Officer, who received the second sample and other exhibits in the Warehouse on the next day i.e.

15.11.2000 at about 2.45 p.m. P.W.3 Ms. Noronha was another officer in charge of the Warehouse.

6. The first submission made by Shri Kanekar, the learned counsel on behalf of the accused is with reference to Section 50 of the Act. Shri Kanekar has submitted that the offer to be searched ought to have been made at the place where the accused was caught near Satarco restaurant and not where the accused was subsequently taken at the Customs House, at Anjuna. In my view this submission has got to be accepted only to be rejected. All that Section 50 of the Act requires is that when a person is about to be searched, the person searched, is required to be informed that he is entitled to be searched before a Gazetted Officer or before a nearest Magistrate. In this respect, in the case of **State of Punjab v. Baldev Singh [(1999) 6 S.C.C. 172]** the Supreme Court has held that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a gazetted officer or a Magistrate and the failure to so inform the suspect of his right would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. Similarly, if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a gazetted officer or a Magistrate, the empowered officer is obliged to

do so and failure on his part to do so would cause prejudice to the accused and also render the search illegal and the conviction and sentence of the accused based solely on recovery made during that search bad.

7. In the case of **Prabha Shankar Dubey v. State of M.P. [(2004) 2 S.C.C. 56]** the Supreme Court has held that there is no specific mode or manner in which the accused is to be informed about his right to be searched before a gazetted officer or a Magistrate and the Court is required to see the substance and not the form of intimation. In the case of **Rajendra and another v. State of M.P. [(2004) 1 S.C.C. 432]** the Supreme Court has held that the provisions of S.50 of the Act are not applicable to search of bags and suitcases. In the case at hand the accused was searched at the Customs House at Anjuna and it is in the evidence of the complainant (P.W.5) as well as P.W.4 Francisco that the accused was given the option to be searched at the Customs House, Anjuna. Since the accused was searched there and the accused was also given an option in terms of S.50 of the Act at that place, in my opinion there is substantial compliance with the provisions of S.50 of the Act. There was no necessity for the complainant to have given the said option contemplated by S.50 of the Act to the accused at the place where he was caught. Nevertheless it must be observed that there has been no explanation coming forth from the complainant as to why the accused was not at all searched at the place near Starco restaurant

and had to be taken to a distance of about 5 to 7 metres to the Customs House at Anjuna, more so because the complainant had prior information and had gone near Starco restaurant all set for the purpose of the raid. In my opinion, there is also no substance in the submission of Shri Kanekar that the offer which was made to the accused had also to be incorporated in the panchanama.

8. The learned Special Judge has come to the conclusion that the complainant has established its case against the accused beyond reasonable doubt. Shri Kanekar, the learned counsel on behalf of the accused, has submitted that it has been stated by P.W.4 that he was called at about 1.00 p.m. and if the information was received by the complainant at 3.00 p.m., a serious doubt is created regarding the said information. In my view the genesis of the story of the complainant is certainly not free from doubt and being so, the entire story of the complainant deserves to be thrown overboard, more so, because the complainant has not examined any other customs officials who had accompanied him and who had actively participated in the seizure of hashish from the accused. P.W.4 Rebello has stated that the complainant telephonically called him initially to their office at Margao on the same afternoon i.e. on 14.11.2000 at about 1.00 p.m. This statement of P.W.4 Rebello militates against the story of the complainant. According to P.W.4 Rebello he went to the Customs House at Margao which is at a distance of 10 kms. from his own house and after being there for a short time, they went to Anjuna in

the departmental jeep. According to him, the complainant and Inspector Pandey were sitting in front of the jeep while he and the second panch were sitting at the rear portion of the jeep. On the other hand, the complainant (P.W.5) stated that on 14.11.2000 at about 15.00 hrs. he received the information from the said Inspector J.T. Cruz and accordingly he, with his staff and two panch witnesses posted themselves in the vicinity of Starco restaurant. At the same time the complainant stated that when the relevant information was received by him from Inspector Shri Cruz he was camping at Chapora with his staff and two panch witnesses. Firstly, it must be observed that in case the complainant received the information from Inspector Cruz at 15.00 hrs. on 14.11.2000 then the complainant could not have certainly conveyed the same and called P.W.4 Rebello at 1.00 p.m. to go for the raid. If the said information was received by the complainant at 3 p.m. at the time when he was camping at Chapora, then the version of P.W.4 Rebello that they had proceeded from the Customs House at Margao near Starco restaurant cannot be correct. Moreover, the DRI-1 information (Exh.42) shows that it was recorded by Inspector Shri J.T. Cruz at Chapora at 15.00 hrs. on 14.11.2000 and as already stated the said J.T. Cruz has not been examined in support of the said DRI-1 (Exh.42) and it is difficult to accept that the said information was recorded in writing even before the complainant was informed about it at Margao. The version of the complainant that he had received the said information at 15.00 hrs. on 14.11.2000 remains without being corroborated when corroboration could have

been obtained by examining the said Inspector Cruz and on the contrary this story is contradicted by P.W.4 Rebello, and, therefore could not have been accepted. If this genesis of the story of the complainant fails then in my opinion the rest of the story of the complainant cannot be free from doubt.

9. The next submission made by Shri Kanekar, the learned counsel of the accused is that the sample and the seized article could have been manipulated and interfered with before they were sent to the Director of Food and Drugs Administration or for that matter to the Customs Warehouse. In support of this submission, Shri Kanekar has placed reliance on the case of **Koyappakalathil Ahamed Koya v. A.S. Menon and another (2002 Cri.L.J. 4502)** and also to another unreported decision of this Court in the case of Raj Kumar v. The State (Criminal Appeal No. 50/2001) dated 20th June, 2003.

In the first case of **Koyappakalathil** (supra) this Court observed that :-

" Be that as it is,but one thing has to be avoided and that is that the person who is having the custody of sample packets and remaining packet which is to be presented before the trial Court should not have the custody of the seals. By following such practice, the possibility of anybody tampering with the sample packet and the remaining packet cannot be overruled.

..... Therefore , the officer having the custody of sample packets and remaining packet should not have the custody of the seals which have been used by the members of the raiding party while effecting the seizure and drawing the panchanama.

..... For the purpose of ensuring this safeness and credibility of the reports of such experts, maximum care has to be taken because in cases the reports of such experts are allowed to be admitted in evidence without such experts being examined. When the sentence provided is severe, the system should be beyond suspicion and above board. “

10. In the case of **Raj Kumar** (supra) this Court observed that:-

“ In this case, curiously, there is no evidence at all that the seal which had been affixed to the sealed property had been deposited by P.W.4 P.S.I. Chodankar. In his testimony P.W.4 P.S.I. Chodankar makes no reference at all to the deposit of the seal either with the P.I. of the Police Station or with P.W.6 Ganpati. Similarly, P.W.6 Ganpati does not refer to the seal being deposited by P.W.4 P.S.I. Chodankar. The sealed packet was handed over by him on the next day to P.W.4 P.S.I. Chodankar. The letter of specimen seal impression was scribed on the next day, that is, on 3rd January, 2000. Thus, on 3rd January 2000, P.W.4 P.S.I. Chodankar had in his possession both, the sealed packet as well as the seal, which had

been affixed, on the said packet. “

This Court further observed that :-

“ In the present case even the carrier has not been examined. Deposit of seal by the Investigating Officer after the sealing is over is of paramount importance. The specimen seal letter should invariably be prepared on the same day. The deposit of the seal alongwith the sealed packet, therefore, then lends an assurance to the Court that the sample which was analysed by the Analyser is the same that was seized from the accused. If the seal remains in the possession of the Investigating Officer and there is no satisfactory evidence that there was no possibility for the sample to have been tampered with, the mere tallying of the seals is of no significance. “

The Court further observed that :-

“ In the present case, in the peculiar circumstances of the case, in the absence of any evidence regarding the deposit of the seal; and, in fact, in the face of positive evidence that the seal remained with P.W.4 P.S.I. Chondankar when he had received the sealed packet from P.W.6 Ganpati, according to me, the possibility of tampering cannot be excluded. “

11. In the case of **Durgo Bai and another v. State of Punjab (2004 A.I.R. SCW 4637)** the submission regarding the possibility of tampering was raised but was not considered by the Court because no ground was taken either before the Trial Court or the High Court and no relevant questions were put in cross-examination to cover

those aspects.

12. However, in this case the possibility that the sample might have been tampered, stares at my face. As already stated, from the seized article two samples were taken by none other than the Inspector Shri Cruz and according to the complainant each of the said two samples (S-1 and S-2) were of 50 gms. each. The evidence of P.W.1 Kaissare shows that the sample (S-1) which he examined was of 51.87 gms. ,and no explanation has come from the complainant as to how the sample which was weighed by Inspector Shri Cruz and which was found to be of 50 gms. turned to be 51.87 gms. at the time when P.W.1 Kaissare tested the same. There has been no explanation whatsoever from the side of the complainant as to what happened to the said samples (S1 and S2) and the seized article from about 8.30 p.m. of 14.11.2000 when the panchanama was completed till about 2.45 p.m. of 15.11.2000 when one of the samples and the seized article was delivered at the Customs Warehouse at Panaji. The sample (S-1) must also have been delivered around that time on 15.11.2000 in the Directorate of Food and Drugs Administration to be examined by the Scientific Officer. In fact, there has not been even a solitary statement from the complainant that during the said period the samples and the seized article were kept in his safe custody !

13. Shri Vaz, the learned Special Public Prosecutor has tried to explain that the samples and the seized article remained with the

complainant till the next date because the warehouse closes at 6 p.m. Firstly, such a statement cannot be accepted from an executive arm of the Government. Accepting the same would be to send a signal to excise duty evaders and smugglers that the Customs Department does not work after 6 p.m. There is also no explanation as to why the articles could not be deposited in the warehouse the next morning.

14. Considering the facts stated hereinabove, the possibility that the sample (S-1) was prone to tampering and in fact that the same has been tampered with could not be ruled out. Being so, and in such a situation, the accused certainly deserved to be given the benefit of doubt.

15. Consequently, I allow the appeal and set aside the Judgment/Order of the learned Special Judge, N.D.P.S. Court, Mapusa, dated 30.8.2003. The accused shall be set to liberty forthwith in case he is not required in any other case.

N. A. BRITTO, J.

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